

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JANE ROCIO EVANS,

Plaintiff,

v.

WALDEN HOUSE, INC.,

Defendant.

No. C 08-0894 PJH

**ORDER DISMISSING COMPLAINT  
WITH LEAVE TO AMEND AND DENYING  
APPOINTMENT OF COUNSEL**

Plaintiff filed a complaint on February 11, 2008, alleging employment discrimination against defendant. She alleges race discrimination resulting in her termination and retaliation. She alleges that the discriminatory conduct occurred on August 9, 2005 and October 31, 2007, and that she received a right to sue letter from the EEOC on November 30, 2007. Plaintiff has filed a request to proceed *in forma pauperis* ("IFP") and a request for appointment of a "Public Defender or attorney."

**I. IFP Application**

The court may authorize a plaintiff to file an action in federal court without prepayment of fees or security if the plaintiff submits an affidavit showing that she is unable to pay such fees or give security therefor. 28 U.S.C. § 1915(a). The in forma pauperis statute also provides that the court shall dismiss the case if at any time the court determines that the allegation of poverty is untrue, or that the action (1) is frivolous or malicious, (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). A claim is frivolous and one for which relief may not be granted if there is no federal subject matter jurisdictional basis for it.

1 To establish federal subject matter jurisdiction for a Title VII claim, a plaintiff must  
2 exhaust his remedies by filing an administrative charge of discrimination with the EEOC  
3 before commencing an action in federal court. B.K.V. v. Maui Police Dept., 276 F.3d 1091,  
4 1099 (9th Cir. 2002); Sommatino v. United States, 255 F.3d 704,708 (9th Cir. 2001). The  
5 relevant statute, 42 U.S.C. 2000e-5(1), requires that a charge under Title VII be filed with  
6 the EEOC within 180 days of the alleged unlawful employment practice.

7 Plaintiff's discrimination claim is based on her termination from employment which  
8 occurred on August 4, 2005. A copy of her EEOC charge is attached to her complaint and  
9 is dated October 31, 2007, a date that is significantly later than the 180-day deadline. The  
10 EEOC right to sue letter is dated November 29, 2007, and presumably is a response to the  
11 October 31, 2007 charge. In that charge plaintiff claims to have filed two charges with the  
12 EEOC "in or about 2005." Copies are not attached. Accordingly, in order to establish  
13 subject matter jurisdiction, plaintiff must show that she filed a charge within the 180-day  
14 deadline, by submitting a copy of the charge(s) and a copy of the right to sue letter(s) sent  
15 to her by the EEOC.

16 The basis of the retaliation claim is not altogether clear. If the claim is based on  
17 plaintiff's termination in retaliation for whistle-blowing activity she engaged in during her  
18 tenure with defendant, it suffers from the same problem as the discrimination charge and is  
19 likely time-barred in the absence of proof of a timely EEOC charge. If it is based on  
20 retaliation for her having filed the alleged 2005 charges, it is difficult to see how that would  
21 qualify as retaliation cognizable under Title VII, which requires proof of an adverse  
22 employment action taken as a result of protected activity. There could be no adverse  
23 employment action taken against someone who was no longer an employee. It appears  
24 that plaintiff's retaliation claim might be based on her allegation that defendant has  
25 wrongfully withheld some of her personal property, which might give rise to a common  
26 claim of conversion, but does not amount to a civil rights violation.

27 In sum, the complaint does not currently establish a basis for federal subject matter  
28

jurisdiction and is therefore DISMISSED. The dismissal is with leave to amend in order to afford plaintiff an opportunity to cure the deficiencies and to clarify her claims. The court reserves ruling on the IFP request pending further review of the amended complaint.

## II. Appointment of counsel

There is no constitutional right to counsel in a civil case unless an indigent litigant may lose his physical liberty if he loses the litigation. See Lassiter v. Dep't of Social Services, 452 U.S. 18, 25 (1981); Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997) (no constitutional right to counsel in § 1983 action), withdrawn in part on other grounds on reh'g en banc, 154 F.3d 952 (9th Cir. 1998) (en banc). However, a court "may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1).<sup>1</sup> The decision to request counsel to represent an indigent litigant under § 1915 is within "the sound discretion of the trial court and is granted only in exceptional circumstances." Franklin v. Murphy, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of the "exceptional circumstances" of the plaintiff seeking assistance requires an evaluation of the likelihood of the plaintiff's success on the merits and an evaluation of the plaintiff's ability to articulate his claims pro se in light of the complexity of the legal issues involved. See Agyeman v. Corrections Corp. of America, 390 F.3d 1101, 1103 (9th Cir. 2004).

Under Title VII, in evaluating a request for appointment of counsel, the court must consider plaintiff's financial resources, efforts made by plaintiff to secure counsel, and whether plaintiff's claim has merit. Bradshaw v. Zoological Soc. Of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981).

Both standards require the court to evaluate the merits of the claim. At this early juncture of the case, a definitive assessment is not possible. However, the court notes the following factors. First, the EEOC apparently conducted no investigation, but instead issued a right to sue letter 30 days after the filing of the charge of discrimination advising

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<sup>1</sup>The Supreme Court has made clear that section 1915 does not give courts the power to make "coercive appointments of counsel." Mallard v. United States Dist. Court, 490 U.S. 296, 310 (1989).

1 plaintiff that it was unable to conclude that a violation had occurred. Second, plaintiff's  
2 claims may very well be time-barred. Thus the court is unable to conclude that the claims  
3 have merit. Accordingly, the request for appointment of counsel, which essentially requests  
4 the court to find volunteer counsel for plaintiff, is DENIED.

5 The amended complaint must be filed by May 30, 2008, or this action will be  
6 dismissed.

7 **IT IS SO ORDERED.**

8 Dated: May 8, 2008



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10 PHYLLIS J. HAMILTON  
11 United States District Judge  
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UNITED STATES DISTRICT COURT  
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Case Number: CV08-00894 PJH

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 9, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jane Rocio Evans  
PO Box 424886  
San Francisco, CA 94142

Dated: May 9, 2008

Richard W. Wieking, Clerk  
By: Frank Justiliano, Deputy Clerk